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Use of WTO Decisions in Judicial Review of Adminstrative Action Under U.S. Antidumping Law

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USE OF WTO PANEL DECISIONS IN JUDICIAL REVIEW OF ADMINISTRATIVE ACTION UNDER U.S. ANTIDUMPING LAW

I. INTRODUCTION

For nearly sixty years, the United States has participated in international trade agreements stemming from the General Agreement on Tariffs and Trade ("GATT").[1] From the beginning, GATT included a dispute resolution system to settle disagreements among party-states; however, the consent nature of the dispute resolution proceedings threatened the viability of the structure.[2] The veto power, "the voluntary nature of membership in GATT, [and] a nation's ability to block the operation of the GATT dispute settlement procedure" rendered the regime vulnerable to unilateral destabilization.[3] In the Uruguay Round of 1994, GATT countries gathered and, among other things, formed the World Trade Organization ("WTO"). The WTO has, in turn, spawned a jurisprudence of its own in the form of panel and appellate decisions.

This body of international jurisprudence sometimes conflicts with the actions of U.S. administrative agencies responsible for the regulation of international trade. U.S. courts confront this conflict between WTO panel decisions and U.S. administrative agency actions with two competing doctrines: (1) the

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[1] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. For a concise history of dispute resolution under the old GATT and WTO systems, see Susan H. Shin, *Comparison of the Dispute Settlement Procedures of the World Trade Organization for Trade Disputes and the Inter-American System for Human Rights Violations*, 16 N.Y. INT'L L. REV. 43, 47 (2003).

[2] Shin, *supra* note 1.

[3] *Id.* at 48.

Chevron doctrine,[4] which dictates that a court will give great deference to an administrative agency's interpretation of ambiguous congressional legislation, complemented by a general judicial deference to executive actions in foreign affairs, and (2) the *Charming Betsy* doctrine,[5] which encourages courts to interpret legislation, including treaties, so as not to violate international law. In the context of this comment, both of these doctrines are seen as interpretive canons.

Interpretive canons are tools that courts use to decide between different possible interpretations of an ambiguous statute or treaty. Courts apply the law, and sometimes Congress leaves a statute open to various possible interpretations. Congress may do so either because it wishes to avoid the political costs of clearly speaking on an issue or because the subject matter of the legislation is extremely complex and the executive branch[6] has a unique institutional competence in a particular area. In international trade law, congressional action (in the form of treaties and statutes) is often lacking in detail regarding the implementation of U.S. trade policies. This can lead to a conflict between a WTO panel decision about obligations under an international agreement and a U.S. administrative agency's assessment of those same obligations.

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[4] Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 842 843 (1984). *See* discussion *infra* Part IV.B.1.

[5] Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804). *See* discussion *infra* Part IV.B.2.

[6] For the purposes of this comment, the executive branch of the U.S. government includes all of the administrative agencies responsible for the enforcement and implementation of congressional legislation. Thus, the terms "executive," the "Commerce Department" (or simply "Commerce"), and the "International Trade Administration" ("Trade Administration") all possess essentially the same relationship to the judiciary and Congress.

This comment will: (1) explain the leading U.S. federal court precedent in addressing the conflict between WTO panel decisions and executive action in antidumping regulation; (2) briefly summarize the reasoning behind the precedent and the counter arguments to that reasoning; and (3) propose a consistent approach to the application of WTO panel decisions in litigation involving interpretation of the Anti-Dumping Agreement and its implementing legislation. Specifically, I propose that WTO panel decisions be given more weight than they are now; panel decisions should set up a presumption of the reasonableness or unreasonableness of executive interpretation of Congressional legislation. This presumption could be rebutted by evidence of a pressing need for a court to defer to the executive under traditional political deference doctrines.

This comment is limited to the narrow context of administrative implementation of antidumping law in the United States and the tension that results when that implementation differs from a WTO panel decision. Antidumping law is particularly useful as an avenue of analysis because it both circumscribes the extent of analysis and provides an insight deep into the doctrinal heart of the issues. I do not attempt in this paper to tackle the entire issue of the applicability of international law in U.S. courts, nor even the more limited issue of application of WTO panel decisions generally in domestic courts. Also, I will not attempt here to explain or examine the general issue of judicial deference to the executive in foreign affairs. Rather, I use the recent decision in

Corus v. United States[7] and other recent federal court decisions regarding antidumping to gain a useful vantage on this developing tension in international law.

II. FACTUAL BACKGROUND, ANTIDUMPING LAW, AND THE WTO AGREEMENT

A. Explanation of the International Anti-Dumping Agreement and Its Implementing Legislation in the United States

"Dumping" has been variously defined.[8] Generally, "[d]umping is a species of price discrimination."[9] Specifically, it is "the practice of charging a lower price in the export market than in the home market for similar merchandise, taking account of any differences in the conditions of sale and the characteristics of the merchandise."[10]

U.S. federal law adopts this definition. According to U.S. federal antidumping legislation, dumping occurs when "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and . . . an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded."[11] According to the U.S. statutory regime, the

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[7] Corus Eng'g Steels Ltd. v. United States, No. 03-110 (Ct. Int'l Trade Aug. 27, 2003). *See* discussion *infra* Part II.C.

[8] Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEX. INT'L L. J. 265, 266 (1987); *Id.* at n.2 (pointing out that among other definitions, dumping has been defined as: "1. Sale at prices below foreign market prices[;] 2. Sale at prices with which [foreign] competitors cannot cope[;] 3. Sale at prices abroad which are lower than current home prices[; and] 4. Sale at prices unremunerative to the sellers").

[9] *Id.* at 266.

[10] *Id.* at 267.

[11] 19 U.S.C. § 1673 (1994). The statute empowers the Department of Commerce to "[impose] upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.*

"administering authority" shall determine "antidumping duties" by comparing the "normal value and export price (or constructed export price) of each entry of the subject merchandise" and calculate "the dumping margin for each such entry."[12]

The U.S. "administering authority" for the regulation of antidumping violations is the International Trade Administration ("Trade Administration"), a division of the Department of Commerce ("Commerce"). The Trade Administration regulates antidumping by investigating alleged violations of antidumping law and assessing antidumping duties.[13] Decisions by the Trade Administration can be appealed to the Court of International Trade.[14] However, the findings of the Trade Administration are given substantial deference.[15]

The Trade Administration was established as an independent agency within the Department of Commerce in order to "insulate the Government's decision to impose antidumping duties from narrowly political concerns."[16] U.S. antidumping law is largely a direct implementation of U.S. international obligations under Article VI of GATT.[17] The Uruguay Round of 1994 attempted to harmonize antidumping regulation among the GATT countries. The U.S. trade negotiators exited the Uruguay Round with the high hope that "all countries which become members of the [WTO] will be subject to the same antidumping

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12 19 U.S.C.A. § 1675(a)(2)(A) (1994).

13 For a very thorough discussion of this process, see *The Uruguay Round Agreements Act Statement of Administrative Action: Agreement on Antidumping* (Sept. 27, 1994),1994 WL 761788 [hereinafter Antidumping Statement]. *See also* 19 U.S.C.A. § 1671 (1994).

14 19 U.S.C. § 1516(c) (1994).

15 21A AM. JUR. 2D *Customs and Duties Import Regulations* § 281 (2004).

16 Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

17 GATT, *supra* note 1.

rules."[18] In the U.S. publication of its understanding, it "recognize[d] the need for a common understanding of the obligations of Members" of GATT.[19] Inevitably, not all countries agree about the proper enforcement of antidumping rules.

B. WTO Panel Decisions

Article 23 of the GATT agreement set up a mutual obligation among parties of the WTO to submit disputes to the WTO dispute resolution system and accept resolutions achieved within that system.[20] The Uruguay Round of 1994 set up a dispute resolution system superior to the old dispute resolution system under GATT.[21] Among the improvements were fixed timetables, increased independence of the tribunal, and speedier and more predictable procedures.[22] The new dispute resolution system, consisting of the Dispute Settlement Body

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[18] Antidumping Statement, *supra* note 13 ("Unlike the 1979 Tokyo Round Antidumping Code (the 1979 Code), all countries which become members of the World Trade Organization (WTO) will be subject to the same antidumping rules.").

[19] *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade, April 15, 2004, 33 I.L.M. 125 (1994), 1994 WL 761483.

[20] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1125, 1241 (1994). GATT, Annex 2, Article 23(2) states:

> In such cases, Members shall:
> (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.

Id.

[21] Shin, *supra* note 1 at 48–49.

[22] World Trade Organization, *Understanding the WTO: Settling Disputes*, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm#appeals (last visited Mar. 26, 2005) ("A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure.").

("DSB" or "panel") and the Appellate Body,[23] have fixed procedural rules and deadlines and a clear appeals process that ensures finality.[24]

Dispute resolution in the WTO system has three steps: (1) consultation, (2) panel decision, and (3) the appeals process.[25] When parties first disagree, they submit their dispute to the WTO, and the organization facilitates a period of consultation. During consultation, the state parties attempt to resolve their conflict. Failing that, the parties submit their dispute to a panel. The panel hears the parties' case and renders a decision on the dispute. The "first rulings" made by the panel can then be endorsed or rejected by the WTO's full membership.[26] More often, the Appellate Body reviews the decisions made by the panel. "The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel, and Appellate Body Reports, once adopted by the Dispute Settlement Body, must be accepted by the parties to the dispute."[27]

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[23] World Trade Organization, *Dispute Settlement: Appellate Body*, *at* http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Mar. 26, 2005).

> The Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. It is a standing body of seven persons that hears appeals from reports issued by panels in disputes brought by WTO Members . . . . The Appellate Body has its seat in Geneva, Switzerland.

Id.

[24] World Trade Organization, *Understanding the WTO*, *supra* note 22.

> Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case.

Id.

[25] Shin, *supra* note 1 at 49-51.

[26] World Trade Organization, *supra* note 22. The decision is made by a consensus of the WTO's full membership. Obviously, this rarely takes place.

[27] *Id.*

C. Corus v. U.S. — *Tension Between U.S Domestic Law and International Law*

Corus v. U.S., decided in the U.S. Court of International Trade in August of 2003, concerned a conflict between an executive interpretation of legislation implementing the Anti-Dumping Agreement and a contrary interpretation of obligations under the agreement by a WTO panel.[28] Corus Group PLC,[29] formerly, British Steel, owns the largest steel producing companies in the United Kingdom. Corus Engineering Steels Ltd. ("Corus"), a subsidiary of Corus Group PLC, manufactures steel and imports large amounts of steel into the U.S.[30]

Several steel manufacturers in the U.S. complained to the U.S. Commerce Department that Corus[31] was allegedly dumping its steel products into the U.S. market.[32] Commerce decided that Corus was, in fact, illegally dumping steel products in the U.S. market and assessed a duty equal to the level of dumping.[33] Corus appealed the finding and argued that it sold the steel products, on average, at or above the U.S. market price.[34] Corus argued that Commerce's

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[28] No. 03-110, slip op. at 1 (Ct. Int'l Trade Aug. 27, 2003).

[29] According to the Corus website:

> Corus [is] an international metal company, providing steel and aluminum products and services to customers worldwide. With an annual turnover of £8 billion and major operating facilities in the Netherlands, Germany, France, Norway and Belgium, Corus employs 48,500 people in over 40 countries . . . . Corus shares are listed on the London, New York and Amsterdam stock exchanges. Corus was created in October 1999 through the merger of British Steel and Koninklijke Hoogovens.

http://www.corusgroup.com/en/company/about_corus/ (last visited Mar. 26, 2005).

[30] *Id.*

[31] According to 19 U.S.C. §§ 1673(1), 1677(35), the Commerce Department is required to determine whether imported merchandise is being or is likely to be sold in the United States at less than its fair value, i.e. the amount by which the price charged for subject merchandise in the home or other comparative market ("the normal value," or "NV") exceeds the price charged for subject merchandise in the United States ("the U.S. price").

[32] *Corus*, No. 03-110, slip op. at 2.

[33] *Id.* Commerce assessed a dumping duty of 4.48%.

[34] *Id.*

methodology of "zeroing" the imported product was contrary to the obligations of the U.S. under Article 2.4.2 of the Anti-Dumping Agreement.[35] If not for the "zeroing" methodology used by Commerce, Corus would not have been found in violation of antidumping regulations and would not have been charged a duty.[36] That is, if not for the zeroing methodology employed by Commerce, the margin of dumping would have been *de minimus* or zero.[37]

The Commerce Department calculates dumping duties by finding the difference between the U.S. price of the imported product and the normal price of the product.[38] In its calculation, Commerce ignores all negative values (that is, imports that are sold above the normal value) and only focuses on those imports that are being sold below the normal value.[39] This "zeroing" of the non-dumping values skews the calculation and makes it much easier to find a dumping violation.

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[35] *Id. See also* Antidumping Statement, *supra* note 13. Article 2.4.2, provides that

in investigations (not reviews), national authorities normally will establish dumping margins by comparing either:

• a weighted-average of normal values to a weighted-average of export prices of comparable merchandise; or

• normal value and export price on a transaction-to-transaction basis. Where such comparisons are inappropriate, however, the United States' current methodology is authorized. Authorities may compare a weighted-average normal value to individual export transactions, provided that there is a pattern of prices that differs significantly and that they explain why a weighted-average-to-weighted-average or transaction-to-transaction comparison is not appropriate.

Id..

[36] *Corus*, No. 03-110, slip op. at 7.

[37] *Id.*

[38] Slater Steels Corp. v. United States, No. 03-162 (Ct. Int'l Trade Dec. 16, 2003).

[39] For example, if the "normal price" (i.e. the fair market value of the good) of a product was $2.00 and the imported price of the good was $1.75, an antidumping duty of $.25 per good would be assessed. Suppose there were a bundle of related or identical goods, with all of their "normal prices" at $2.00, half of which are sold in the U.S. for $2.25 and half of which are sold for $1.75. Under the methodology approved of by the WTO, the net antidumping duty should be $0.00 (($2.00 - $2.25) + ($2.00 - $1.75)). Under the U.S. zeroing methodology, however, the imported goods sold at $2.25 would be ignored. Consequently, the negative result ($2.00 - $2.25 = -$.25) would not be used to offset the positive result ($2.00 - $1.75 = $.25). Thus, the antidumping duty for the bundle of goods would remain $.25 for every good sold at $1.75.

Previously, the Court of International Trade had approved of the Commerce Department's zeroing methodology as a permissible interpretation of antidumping law.[40] In *Serampore Industries*, the court acknowledged the "substantial deference" it gives to "[Commerce] in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law."[41] The court decided that Commerce's interpretation was reasonable because it "interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales."[42] In *Bowe Passat*, the court acknowledged that the "methodology introduces a statistical bias in the calculation of dumping margins," but that it was still a reasonable interpretation of antidumping law because the "statute is silent on the question of zeroing negative margins" and the methodology was "necessary to combat masked dumping."[43]

Corus, nevertheless, argued that the "zeroing" methodology was illegal under the Anti-Dumping Agreement.[44] In making this argument Corus relied on a decision by a panel and an appellate decision in the *EC Bed Linen* case.[45]

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[40] Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce, 675 F.Supp. 1354, 1361 (Ct. Int'l Trade 1987).

[41] *Id.* Masked dumping is a species of dumping wherein a company sells some products above market price in order to "mask" the dumping of products sold below cost. In *Serampore*, the court simply accepted Commerce's masked dumping rationale for using a zeroing methodology; the court did not scrutinize the necessity or reasonableness of the methodology. *Id.*

[42] *Id.*

[43] Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. United States, 926 F.Supp. 1138, 1150 (Ct. Int'l Trade 1996).

[44] Corus Eng'g Steels Ltd. v. United States, No. 03-110, slip op. at 1 (Ct. Int'l Trade Aug. 27, 2003).

[45] Report of the Appellate Body, European Communities -- Antidumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB.R (Mar. 1, 2001), available at 2001 WTO LEXIS 13 [hereinafter *EC Bed Linen*].

Notably, in *EC Bed Linen*, the WTO panel decided that the European Community's use of a similar "zeroing" methodology violated the Anti-Dumping Agreement.[46]

The *Corus* Court declined to apply the WTO panel decision and held that, despite the WTO panel's decision, Commerce's use of zeroing was reasonable,[47] and that Commerce was not bound by a WTO panel decision in applying Congress's implementing legislation of the Anti-Dumping Agreement.[48] The court decided against Corus and allowed the antidumping duties to stand.

On February 19, 2004, the European Communities requested that the WTO establish a panel to review the *Corus* Court's decision.[49] The European Community has sent two such requests to the WTO requesting a panel. The U.S. has blocked both of those requests. However, according to the WTO rules, the third request cannot be blocked by the U.S. Thus, a Panel is nearly certain to be convened on this issue in the near future. It seems likely that *Corus* was a test case to get the "zeroing" issue before a WTO Panel. This is evident from the lack of a U.S. federal appeal by Corus. Rather, the European Community is "appealing" the court's decision with a request to the WTO.

The *Corus* Court was not the first court to address and disregard the *EC Bed Linen* decision in interpreting antidumping law. The previous year, in *Timken*, the court held that it was not dispositive that the zeroing methodology

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46 *Id.*

47 *Corus*, No. 03-110, slip op. at 7.

48 *Id.*

49 Request for the Establishment of a Panel by the European Communities. *United States -- Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS 294/7/Rev. 1 (Feb. 19, 2004).

employed by Commerce was contrary to the WTO decision in the *EC Bed Linen* case, because WTO Panel decisions are "non-binding" on the court.[50] The court reasoned that "the ministerial body of the WTO is the only body that can interpret" a decision by a panel or the appellate body.[51] Therefore, the court reasoned, a WTO panel interpretation of U.S. obligation under the Anti-Dumping Agreement had no weight in court.[52]

Such dismissals of WTO panel decisions are now the norm in antidumping regulation. This slighting of panel decisions has led to increasing tension between the actions of the executive branch (the Commerce Department in particular) and international understanding of U.S. obligations under the Anti-Dumping Agreement, as evidenced by the WTO dispute resolution system.

III. WHY DON'T U.S. COURTS APPLY THE DECISIONS OF THE WTO PANEL IN ANTIDUMPING CASES AGAINST THE COMMERCE DEPARTMENT?

There are several reasons that U.S. courts do not apply WTO Panel decisions directly. The most obvious reason is that the implementing legislation of the Anti-Dumping Agreement expressly forbids it.[53] The next most obvious

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[50] "This Court does not automatically assume that the WTO Panel and Appellate Body decisions are correct interpretations of United States obligations pursuant to the GATT. Rather, they are non-binding decisions." Timken Co. v. United States, 240 F. Supp. 2d 1228, 1239 (Ct. Int'l Trade 2002).

[51] *Id.* at 1239 n.15.

[52] *Id.* at 1244 ("Therefore, the Appellate Body's decision in EC-Bed Linen does not compel a change to this Court's holding in *Bowe Passat* . . . that the Department's zeroing practice is upheld 'until it becomes clear that such practice is impermissible.'").

[53] 19 U.S.C. § 3512(c)(1) (1994) states:

(1) [N]o person other than the United States --

(A) shall have a cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or

reason is that the *EC Bed Linen* case was decided between the European Community and India; the U.S. was not party to the dispute and WTO decisions do not have a *res judicata* effect on states not party to a particular dispute.[54]

There are, however, more general doctrinal reasons for this judicial reticence. In general, judicial deference to the executive branch in this area stems from two principal doctrines of American jurisprudence that have traditionally supported the United States' dualist approach to international law. First, courts have historically deferred to the executive in foreign affairs because the executive was seen as the political branch best suited to make determinations regarding foreign relations and international law. There are at least three principal reasons for this general foreign affairs deference:[55] (1) the executive branch acts as the "sole organ" of the United States in foreign affairs;[56] (2) foreign affairs questions

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> inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with such an agreement.

Id. However, this does not mean the WTO panel decisions are not important in antidumping disputes in general. 19 U.S.C. § 3512(c) clearly does not allow an independent action based on the Uruguay Rounds agreement, but it does not preclude arguments about the interpretation of the agreements in ordinary antidumping duty protest actions, like the underlying cause in *Corus* based on Rule 56.2 of the Court of International Trade. *Corus*, No. 03-110, slip op. at 1. *See also* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 735 n.208 (2003).

[54] Slater Steels Corp. v. United States, No. 03-162, slip op. at 6 (Ct. Int'l Trade Dec. 16, 2003).

[55] Curtis Bradley suggested four types of foreign affairs deference: (1) Political Question Deference; (2) Executive Branch Lawmaking Deference; (3) International Facts Deference; (4) Persuasiveness Deference; and (5) Chevron Deference. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659–663 (2000). Jonathan Charney identified eight reasons for judicial deference in foreign relations: (1) International law may not be "law" in domestic setting; (2) the need for an independent judiciary; (3) the executive's expertise in international law; (4) executive access to facts particular to foreign affairs; (5) the alien quality of international law; (6) uncertainty of effects in foreign affairs decisions; (7) the need for a sole voice in foreign affairs; and (8) the need for executive flexibility in foreign affairs. Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 808–812 (1989). This author has condensed the list to three, incorporating all of the relevant factors to the judicial deference at issue: conflict between WTO panel decisions and executive regulations in antidumping.

[56] *See* discussion *infra* Part III.A.1.

tend to be policy-based and political rather than legal;[57] and (3) executive expertise and specialized knowledge are better suited to foreign affairs questions.[58]

The second reason for judicial reluctance to use WTO panel decisions to invalidate executive branch interpretation of the Anti-Dumping Agreement is the *Chevron* doctrine.[59] According to this doctrine, courts, in certain circumstances, give the administrative agencies (like the Commerce Department) broad discretion in interpreting and implementing ambiguous legislation, including treaties. This broad discretion granted by courts sometimes comes into opposition with an interpretative canon, the *Charming Betsy*, which encourages courts to avoid an interpretation of an ambiguous statute that would violate international law. The potential conflict arises when an agency interprets a statute contrary to the decision of an international tribunal, like the WTO panel. This has led to increasing tensions between international law and domestic law; *Corus* is the latest example of this tension in the context of antidumping law.

Various approaches have been recommended to alleviate this apparent incongruity of international and domestic law. On one extreme, some commentators advocate a "rule of law" approach that would give judges complete discretion to decide "what the law is," and then apply the decisions of international tribunals so as to harmonize domestic law with international obligations.[60]

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[57] *See* discussion *infra* Part III.A.2.

[58] *See* discussion *infra* Part III.A.3.

[59] *See* discussion *infra* Part III.B.

[60] *See* discussion *infra* Part IV.A.

On the other extreme, some recommend a judicial "hands-off" approach to foreign affairs: encouraging courts to avoid any attempt to contradict the executive branch in foreign affairs.[61] This appears to be close to the approach taken by courts recently in antidumping law decisions.[62] The Court of International Trade, for example, mentions the *EC Bed Linen* case and then proceeds to completely disregard it in favor of an executive interpretation of antidumping law.[63]

This author recommends an approach[64] between the two extremes: executive implementation of ambiguous treaties should be granted substantial deference, but decisions by an international tribunal should be significant evidence of the reasonableness of the agency's interpretation. Under the recommended approach, a WTO panel decision, such as *EC Bed Linen*, would not control a court's decision; rather, it would set up a presumption of unreasonableness against a contrary executive interpretation of antidumping law. Such a presumption could be rebutted, but it would require more than mere assertion of a policy concern — it would require proof of an overriding executive interest in acting contrary to a WTO panel decision.

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[61] *See* discussion *infra* Part IV.B.

[62] Slater Steels Corp. v. United States, No. 03-162, slip op. at 5–6 (Ct. Int'l Trade Dec. 16, 2003); Corus Eng'g Steels Ltd. v. United States, No. 03-110, slip op. at 7 (Ct. Int'l Trade Aug. 27, 2003); Timken Co. v. United States, 240 F. Supp. 2d 1228, 1239 (Ct. Int'l Trade 2002).

[63] *Id.* In *Slater*, the Court summarily dismissed the *EC Bed Linen* case as inapplicable to the United States. No. 03-162, slip op. at 6. The court was correct in noting that WTO Panel decisions lack *stare decisis* effect and the United States was not a party (and thus, not bound). However, the *Slater* court, along with the courts in *Corus* and *Timken*, failed to discuss the merits and reasoning of the *EC Bed Linen* case.

[64] *See* discussion *infra* Part IV.C.

A. Political Question Deference

Generally, the judiciary grants significant deference to the executive in foreign affairs because the executive branch, as opposed to the judicial branch, is uniquely suited to act in the realm of foreign affairs. This division of labor among the branches of government may loosely be termed a version of the political question doctrine.[65] When confronted with a political question, a court will generally avoid contradicting the political branch of government. The political question doctrine is not an absolute bar to judicial action. Rather, courts will balance the potential effects of judicial action with the reasons why the executive branch alone is competent to act.[66] Three arguments favor the executive branch's competence to act alone: (1) the executive is the "sole organ" or sole voice of the United States; (2) foreign affairs questions tend to be policy-based and political rather than legal; and (3) executive expertise and specialized knowledge are better suited to foreign affairs questions.

Before assessing these arguments, it is useful to note that there is a distinction between non-justiciable political questions and those political questions that are justiciable, but the judiciary defers to the judgment of the executive branch. One authority notes:

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65 "Political-question doctrine: The judicial principle that a court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government." BLACK'S LAW DICTIONARY 1179 (7th ed. 1999). *See also* 16 C.J.S. *Constitutional Law* § 176 (2004) ("Except to the extent that such power is conferred on the courts by constitutional or statutory provisions, it is not within the province of the judiciary to determine political questions.").

66 [I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Baker v. Carr, 369 U.S. 186, 211–212 (1962).

> [The political question] label does not necessarily mean that the issue is considered nonjusticiable. Instead, in many political question cases, courts are simply holding that the President's decision was within his authority and therefore law for the courts.[67]

1. The Executive acts as the "sole organ" or sole voice of the United States in foreign affairs

Proponents of this justification would point to the solidarity required in international negotiations in general and in trade negotiations in particular. The seminal case presenting this position is *Curtiss-Wright*.[68] In *Curtiss-Wright*, the court recognized that

> if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[69]

Since then, courts have been reluctant to disturb the actions of the executive in the international arena.[70] This judicial reticence includes questions

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[67] Bradley, *supra* note 55 at 660. Bradley continues:

> For example, the Supreme Court has labeled as "political" the issue of whether, after a change of conditions, a foreign nation continues to remain a party to a treaty, but the Court has not treated the issue as non-justiciable; rather, it has accepted as legally binding the executive branch's determination of the issue. Nevertheless, there are instances of non-justiciable political questions in the foreign affairs area, especially in the lower courts. Indeed, although this "pure" version of the political question doctrine has waned substantially in recent years as a general matter, it still appears to have some force in the foreign affairs area.

Id.

[68] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

[69] *Id.* at 320.

[70] "[T]he courts traditionally refrain from disturbing 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of foreign relations.'" Footwear Distrib. & Retailers of Am. v. United States, 852 F. Supp. 1078, 1096 (Ct. Int'l Trade 1994) (quoting Curtiss-Wright, 299 U.S. at 320).

of international trade.[71] In *Federal Mogul*, the court recognized that "[t]rade policy is an increasingly important aspect of foreign policy, an area in which the executive branch is traditionally accorded considerable deference."[72] The court stressed the political flexibility required for an administrative agency to interpret and implement foreign trade law.[73] However, the court seemed to contradict itself by stating that "[a]ntidumping duties are not simply tools to be deployed or withheld in the conduct of domestic or foreign policy."[74] In the end, the court concluded that despite the neutral purpose of antidumping duties, "[f]or the Court of International Trade to read a GATT violation into the statute, over Commerce's objection, may commingle powers best kept separate."[75] In other words, the court followed the traditional "sole-voice" approach and declined to pass judgment on the actions of an administrative agency engaged in international relations.

The executive branch, however, including its constitutive administrative agencies, is not the "sole organ" of international trade regulation. Generally, there are the obvious examples of commingling of foreign affairs power, such as the Senate's participation in the Executive's treaty making power[76] and Congress' constitutional prerogative to regulate international commerce, declare war on foreign states, and define violations of the law of nations.[77] In particular,

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[71] *See* Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995).

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 1582.

[76] "[The Executive] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

[77] Congress has constitutional authority to regulate commerce, define offenses against the law of nations, and declare war. U.S. CONST. art. I, § 8, cl. 2, 10, 11.

Congress is granted constitutional authority over the imposition of duties and tariffs.[78] Pursuant to this power, Congress has instructed the Trade Administration to consult with the appropriate congressional committee when deciding whether to alter existing procedures or policies in reaction to an adverse WTO panel report.[79]

The "sole organ" consideration ignores strong policies supported by the Anti-Dumping Agreement; therefore, it does not justify judicial ignorance of the GATT Antidumping and Subsidy Codes[80] and the opinions of the international tribunals instituted to adjudicate disputes about obligations under GATT. Indeed, GATT and the Anti-Dumping Agreement are international attempts to establish a fair playing field[81] with clear guidelines, an attempt that Congress endorsed by signing the GATT Agreement.[82] Clear congressional endorsement of an international body would belie the notion that the executive branch is the only political branch of the government whose will is represented by U.S. participation in international trade.

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[78] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

U.S. CONST. art. I, § 10, cl. 2.

[79] 19 U.S.C. § 3533, entitled "Dispute Settlement Panels and Procedures," instructs that when "a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements," the Trade Representative must consult with "the appropriate congressional committees" and "private sector advisory committees" before amending any policies or procedures. § 3533(g).

[80] Fundicao Tupy S.A. v. United States, 652 F. Supp. 1538, 1543 (Ct. Int'l Trade 1987).

[81] *See* Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1580 (Fed. Cir. 1995) ("Antidumping jurisprudence seeks to be fair, rather than to build bias into the calculation of dumping margins.").

[82] *See generally* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

2. Foreign affairs questions tend to be policy-based and political rather than legal

Courts are also reluctant to question a politically accountable branch of government regarding matters of policy. While it is admitted that the judiciary is the final voice when it comes to *legal* questions, *policy* questions are best left to the executive and legislative branches as those branches which are closer to the people. This policy argument seems especially pronounced regarding WTO decisions.

Antidumping and tariffs generally are politically sensitive and policy-intense areas of decision-making. Proponents of this view would cite the domestic responses to the WTO panel's decision, in November, 2003, that U.S. steel tariffs were illegal, clearing the way for the European Union to impose $2 billion of sanctions unless the U.S. abandons the duties.[83] The Bush administration and some members of Congress discredited the panel's decision and contemplated ignoring it altogether.[84] On the other side, some pundits argued that the U.S. should respect the decision because the political cost of undercutting the WTO outweighs the benefit of ignoring its ruling.[85] It seems that a court might view the whole issue of responding to a WTO panel decision as a question of policy rather than law. Such a view was adopted by the court in *Corus*.[86] Some

[83] Elizabeth Becker, *US Tariffs on Steel are Illegal, World Trade Organization Says*, N.Y. TIMES, November 11, 2003, at A1.

[84] *Id.*

[85] *Id. See also* Thomas Crampton, *Japan and E.U. Threaten U.S. on Import Sanctions*, N.Y. TIMES, November 11, 2003 at A1.

[86] Corus Eng'g Steels Ltd. v. United States, No. 03-110, slip op. at 7 (Ct. Int'l Trade Aug. 27, 2003).

courts have accepted a blanket statement of such policy-based deference in antidumping law.[87]

Judicial abdication based on such a sweeping policy-based characterization of tariff and antidumping law is flawed. Many court decisions touch on questions that policy makers are vitally interested in. Additionally, a political branch has spoken on this subject; the policy of the U.S. has been announced by the joining of an international organization dedicated to the harmonization of trade practices. Prior to the Uruguay round, a court noted that "when Congress enacted the Trade and Tariff Act, it reaffirmed its intention to maintain the consistency of United States laws." In addition, the establishment of an independent governmental agency, the Trade Administration, to implement the Anti-Dumping Agreement further evidences U.S. commitment to a non-policy-based enforcement of the Agreement. As the *Federal Mogul* Court admitted,

> the independent status of the International Trade Commission was intended to insulate the Government's decision to impose antidumping duties from narrowly political concerns.[88]

There simply is not enough room for the executive to promulgate a policy that would undermine the stability of an international regime that Congress has endorsed. Consequently, the Commerce Department's interpretation of permissible antidumping regulation contrary to U.S. treaty obligations, as evidenced by

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[87] *Fed. Mogul*, 63 F.3d at 1582. ("Commerce is due judicial deference in part because of its established expertise in administration of the Act, and in part because of 'the foreign policy repercussions of a dumping determination.'"); Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (1st Cir. 1983) ("[T]he foreign policy repercussions of a dumping determination . . . makes the enforcement of the antidumping law a difficult and supremely delicate endeavor.").

[88] 63 F.3d at 1581.

an international tribunal's decisions, should not be endorsed as a policy-based decision.

3. Executive expertise and specialized knowledge are better suited to foreign affairs questions

Administrative agencies are often privy to a significant amount of information regarding foreign affairs that are not available to the judiciary. Consequently, judges may be reluctant to question the political branch that seems to have all of the answers.[89] This executive expertise seems to fall into two groups. First, the employees and agents of the Trade Administration have significantly more experience dealing with the intricacies of international trade than an average federal judge. A judge may be uncomfortable adventuring into such an "alien" area of law and facts. Second, much information is simply not available to the judge from an appropriate domestic source of information. In the pursuit of relevant information, a judge may find herself delving into sensitive diplomatic issues outside the traditional scope of judicial scrutiny. In the area of antidumping cases, a federal judge may decline to impose her judgment because the Trade Administration is the expert in this area and the judge lacks effective or appropriate access to information that would rebut the administration's findings.

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[89] Jonathan Charney of Vanderbilt University noted that:

> [c]ourt forays into international law are often episodic. Judges may consider themselves ill-equipped to decide any such questions placed before them. For example, treaties are negotiated in international forums whose records may be unfamiliar. The sources of customary international law are similarly unfamiliar. Some domestic judges would prefer to rely upon the views of the executive branch, which has expertise in these matters.

Charney, *supra* note 55, at 809.

This argument is curious because it belies one of the key features of American jurisprudence: the parties are the agents of discovery, not the judge. Also, the executive presumably does not enjoy an absolute monopoly on knowledge of the application of international trade law. In *Corus*, the defending party hired competent and knowledgeable counsel, experts in international antidumping law. Further, there are other organizations with significant interest in the application of antidumping law that might provide guidance and expertise. The WTO employs highly qualified staff and enjoys access to all of the information necessary to make the determinations.

Regarding access to sensitive diplomatic information, this concern makes little sense when applied to antidumping law. The law has been codified by Congress in the context of an international agreement. Though the Executive certainly is privy to an administration's goals in implementing the Anti-Dumping Agreement, Congress has endorsed the promotion of a consistent international regime. Therefore, it seems unlikely, though possible, that the Trade Administration would be privy to diplomatic information that would dispute the need for a transparent and internationally harmonious application of the agreement. As with the question of policy, any diplomatic information that would undermine the integrity of an international regime endorsed by Congress should be given little weight in the abstract. In other words, absent clear indication of specific information or sources of information that the Executive alone is privy to, a court should be reluctant to refuse review based on the speculative possibility of such information.

B. Chevron *Deference, the* Charming Betsy *Canon, and Their Conflict*

Under the *Chevron* doctrine, courts typically grant deference to the executive branch in determining the application of some statutes. However, in the arena of foreign affairs and treaties, another doctrine, the *Charming Betsy* interpretive canon, may trump the *Chevron* doctrine. The *Charming Betsy* canon holds that when a statute is ambiguous, a court ought to interpret so as not to violate international law. But the conflict of WTO panel decisions with executive determinations takes place one step removed from the traditional conflict. The nature of WTO panel decisions adds a complication to the ordinary tension between the two doctrines.

1. The Chevron *doctrine*

In general, the *Chevron* doctrine permits a court to grant substantial deference in the interpretation of a statute. However, this doctrine may be trumped by the *Charming Betsy* canon of interpretation. This conflict has special significance to interpretation of antidumping law because Congress has not specified the methodology (whether zeroing or another methodology), and the WTO has spoken on the impermissibility of zeroing under GATT.

In *Chevron*, the Supreme Court set out the "Chevron test":

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.

> Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [90]

The Court set up a two prong test for judicial interpreting of legislation, including treaties and statutes: (1) Does the statute or treaty specifically require a particular interpretation? If it does, then the court must apply the statute as explicitly required; (2) If the statute or treaty is ambiguous, is the interpretation of the legislation by an administrative agency permissible? If so, then the court must "defer, even if it would have come to quite a different view if left to its own devices."[91] One court noted:

> The court need not conclude that the agency's construction is the only reasonable one, or that it would have reached that result had the question arisen before it in the first instance.[92]

In the case of *Corus*, the court first determined that the implementing legislation of the Anti-Dumping Agreement did not specify how antidumping duties should be levied.[93] Then the court afforded great deference to the interpretation of the Trade Administration in using the zeroing methodology.[94]

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[90] *Chevron*, 467 U.S. at 842–843. In the context of antidumping law, the *Chevron* doctrine requires a court to "sustain Commerce's determinations unless they are 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" Slater Steels Corp. v. United States, No. 03-162, slip op. at 1 (Ct. Int'l Trade Dec. 16, 2003) (quoting 19 U.S.C. § 1516a(b)(1)(B)). "Under *Chevron*, it is only if the Court concludes that 'Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear,' that the Court will defer to Commerce's construction." *Id.* (quoting Timex V.I., Inc. v. United States, 157 F.3d 879, 881 (Fed. Cir.1998)).

[91] Cont'l Air Lines v. Dep't of Transp., 843 F.2d 1444, 1449 (D.C. Cir. 1988).

[92] Footwear Distrib. & Retailers of Am. v. United States, 852 F. Supp. 1078, 1089 (Ct. Int'l Trade 1994). *See also* Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Udall v. Tallman, 380 U.S. 1, 16 (1965).

[93] The *Corus* Court noted that "[b]ecause the antidumping statutes are silent regarding the treatment of negative margins, the practice of zeroing has been challenged a number of times in different contexts." Corus Eng'g Steels Ltd. v. United States, No. 03-110, slip op. at 17 (Ct. Int'l Trade Aug. 27, 2003).

[94] Relying on precedent, the court held that Commerce's interpretation of antidumping legislation was reasonable because it prevented "masked dumping." *Id. See also* Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce, 675 F.Supp. 1354, 1360-61 (Ct. Int'l Trade 1987); Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. United States, 926 F.Supp. 1138, 1150 (Ct. Int'l Trade 1996); Timken Co. v. United States, 240 F. Supp. 2d 1228, 1243–44 (Ct. Int'l Trade 2002).

At least one scholar has advocated a *Chevron* deference approach to judicial review of executive application of international law,[95] including treaties and their executing legislation.[96] Curtis Bradley suggested a *Chevron* approach to judicial deference to the executive in the international arena. This approach is certainly attractive. It would add consistency and coherence to the analysis of this question because it would adopt a well established doctrine in an area of uncertain precedent. For the purposes of this section, this author will assume that a federal district court[97] would apply a *Chevron*-like approach to the question before us, namely, should a decision by the Department of Commerce be scrutinized using a WTO panel decision?

The Anti-Dumping Agreement was incorporated into U.S. law.[98] The statute does not specify which methodology must be used to calculate antidumping duties.[99] The question then becomes whether Commerce permis-

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[95] Bradley, *supra* note 55 at 651 652. Curtis Bradley proposed that courts should apply a general *Chevron* deference to executive branch decisions in foreign affairs. He argued that much could be gained

> by considering foreign affairs law from the perspective of the Chevron doctrine in administrative law. Under this doctrine, courts will defer to an agency's interpretation of an ambiguous statute if the agency has been charged with administering the statute and the agency's interpretation is based on a "permissible" reading of the statute.

Id.

[96] Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184 85 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS §326(2) (1987) ("Courts . . . will give great weight to an interpretation made by the Executive Branch."); El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 167 (1999); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933); Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985) (stating that the executive branch's "logical reading" of a treaty "is entitled to considerable deference").

[97] The Court of International Trade recently adopted this approach in reviewing Commerce's antidumping regulations. Slater Steels Corp. v. United States, No. 03-162, slip op. at 1 (Ct. Int'l Trade Dec. 16, 2003).

[98] 19 U.S.C. § 1671 (2005) *et. seq.*

[99] 19 U.S.C. § 1673(2) (1994), which states:

> If --
> (2) the [Trade Administration] determines that
> (A) an industry in the United states
> (i) is materially injured, or
> (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that

sibly interpreted the statute. Congress has entrusted the application of the Anti-Dumping Agreement and its executing domestic law to Commerce and, in particular, the Trade Administration.

Even if a court concluded that Commerce's interpretation of the Anti-Dumping Agreement was questionable, a court still may grant discretion because of the Executive Branch's implied authority over foreign affairs legislation. Because Congress typically grants the Executive Branch power to implement international trade law, any administrative provision touching on it might be shielded by foreign affairs deference. The Supreme Court recognized this supplementary category of deference in *U.S. v. Mead Corp.*:

> Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. *When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority* to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. [100]

Thus, the *Chevron* doctrine may offer separate grounds, other than foreign affairs deference, for executive dominance in the realm of foreign affairs.

> merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty.

Id. The text of the statute itself does not specify how the Trade Administration should "determine" such injury. Courts have noted that the statutory language is silent as to the methodology to be adopted in assessing antidumping duties. *See, e.g., Bowe Passat*, 926 F. Supp. at 1150 ("The statute is silent on the question of zeroing negative margins."); *Serampore*, 675 F. Supp. at 1360 ("A plain reading of the statute discloses no provision for Commerce to offset sales made at LTFV with sales made at fair value.").

[100] 533 U.S. 218, 229 (2001) (citations omitted & emphasis added).

However, this doctrine loses some of its strength when held up next to a sometimes competing doctrine: the preference for avoiding violation of international law in judicial interpretation of congressional enactments.

2. The Charming Betsy *may trump* Chevron

Courts hesitate to apply the *Chevron* doctrine directly if the administrative agency's interpretation of the statute would violate U.S. obligations in international law. The *Charming Betsy* canon acts as a braking mechanism on the broad application of U.S. law in the international arena. Simply stated, the *Charming Betsy* canon states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[101] The Restatement (Third) of Foreign Relations states the rule thus: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[102]

The *Charming Betsy* is not a substantive application of international law, though some would advocate such a use.[103] Rather, the *Charming Betsy canon* is an interpretative tool. Congress may choose to violate international law, whether

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[101] Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804). The Supreme Court also stated:

> [A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

Id.

[102] RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 114 (1987).

[103] Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 498 (1998). Though he disagrees with the view, Bradley notes that:

> [s]ome judges and commentators . . . [have] argued for what could be called an "internationalist conception" of the canon. In essence, this conception views the canon as a means of supplementing U.S. law and conforming it to the contours of international law. Under this view, courts should use the canon not primarily to implement legislative intent, but rather to make it harder for Congress to violate international law, and to facilitate U.S. implementation of international law.

Id.

the international norm is established by treaty[104] or customary international law.[105] "The *Charming Betsy* canon does not apply when the reach of a statute is clear."[106] As the D.C. Circuit Court of Appeals stated, a judge's "duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law."[107] In other words, Congress may violate international law, but courts will presume that Congress did not intend such a violation absent clear legislative intent.

It is useful to note the historical context of the *Charming Betsy* decision. Curtis Bradley noted that *Charming Betsy* was decided in an era very different from the current one.[108] He pointed out three principal distinctions between the world of *Charming Betsy* and our own. First, the U.S. was a fledgling state, eager to avoid war with the more powerful international actors.[109] The Court recognized that it was in the nation's best interest not to unnecessarily interpret statutes so as to antagonize more powerful European states. Second, at the

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[104] *See* Breard v. Greene, 523 U.S. 371, 376 (1998); Ping v. United States, 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Edye v. Robertson, 112 U.S. 580, 597 (1884).

[105] *See, e.g.*, Galo-Garcia v. Immigration & Naturalization Serv., 86 F.3d 916, 918 (9th Cir. 1996); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir.), *cert. denied*, 575 U.S. 1022 (1986); The Paquete Habana, 175 U.S. 677, 700 (1900).

[106] Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHIC. LEGAL F. 323, 332 (2001). *See also Yunis*, 924 F.2d at 1091; *Garcia-Mir*, 788 F.2d at 1453; Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."); Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1323 (D.C. Cir.1980) (U.S. courts are "obligated to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law.").

[107] *Yunis*, 924 F2d at 1091. *See also* Reed v. Wiser, 555 F.2d 1079, 1093 (C.A.N.Y. 1977).

[108] Bradley, Charming Betsy *Canon*, *supra* note 103, at 491–492 (Bradley examined the "contemporary validity of the *Charming Betsy* canon" and pointed out that "it may be useful to consider first the historical context of its adoption." He criticized the blind use of the canon without "considering the context in which the [canon] w[as] made.").

[109] *Id.* at 492 (The "Supreme Court was undoubtedly aware," when *Charming Betsy* was decided, that "the U.S. government had a strong desire to avoid violations of international law, largely due to a fear that a violation might embroil the United States in a military conflict.").

beginning of the nineteenth century, international law was commonly used as a kind of federal common law.[110] Therefore, the commonly accepted canon of preferring interpretations of statutes that do not contradict the common law supported a similar preference when it came to international law.[111] Finally, Bradley points out that, at the time of Justice Marshall, "international law . . . was widely considered to be objective and discoverable . . . due in part to international law's association with natural law."[112] Because international law was seen as "founded on the great and immutable principles of equity and natural justice,"[113] it could be "deducible by natural reason."[114]

Times have changed. No longer a quaking, fledgling nation, the United States is the preeminent military superpower of the world. Federal common law was expressly rejected in *Erie*.[115] Finally, since Justice Holmes and the realist revolution, mainstream American jurisprudence has jettisoned natural law as a

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[110] *Id.* at 493 ("Courts in the nineteenth century treated [customary international law] as part of the 'general common law.'"). *See also* Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1211 1214 (1988); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1527 38 (1984); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1263 65 (1985). These articles aid understanding of the relationship between customary international law and the evolution of federal common law. These articles were all referenced by Bradley in his article. Bradley, Charming Betsy *Canon*, *supra* note 103, at 492 n.75.

[111] Bradley, Charming Betsy *Canon*, *supra* note 103, at 492.

[112] *Id.* at 494.

[113] The Venus, 12 U.S. 253, 297 (1814) (Marshall, concurring).

[114] Bradley, Charming Betsy *Canon*, *supra* note 103, at 510 (quoting Blackstone who declared that universal principles were "deducible by natural reason," and that they "result from those principles of natural justice, in which all the learned of every nation agree"). *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 66 67 (1796).

[115] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) states:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. *There is no federal general common law.*

(emphasis added).

general doctrinal principle.[116] Justice Holmes rejected the idea of a discoverable, objective body of natural law:

> It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found.[117]

International law was thereby firmly distinguished and distanced from domestic law in the United States.

In light of these considerations, Bradley suggested a reassessment of the continuing relevance of the *Charming Betsy* doctrine. He rejected characterizing the doctrine as either a fiction of implied legislative intent[118] or a substantive application of international law.[119] He came to the conclusion that the *Charming Betsy* doctrine should be viewed as

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[116] The Court in *Erie*, concluded that the practice of the federal courts in developing their own general common law rested on a fallacy. This fallacy involved the assumption, in the words of Justice Holmes, that "there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" Bradley, Charming Betsy *Canon*, *supra* note 103, at 514.

[117] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928).

[118] Bradley, Charming Betsy *Canon*, *supra* note 103, at 495, 518. Among Bradley's criticisms of implying an "internationally law-abiding character" to Congress was the significant empirical evidence that contradicts such an assumption. *Id.* Bradley argues that "an intent-based account of the *Charming Betsy* canon would have to confront problematic empirical evidence suggesting that compliance with international law is often not the political branches' paramount concern." *Id.* He points to some examples: The recent Helms-Burton Act, the Iran-Libya Sanctions Act, and "the failure by Congress during the last several years to authorize timely payment of United States dues to the United Nations." *Id.*

[119] *Id.* at 523. The "Internationalist Conception," as Bradley sees it, would dictate that a court "[construe] a statute broadly to mirror international law, even if such a construction is not necessary in order to avoid a violation of international law." *Id.* at 499. "The internationalist conception is closely identified with the view that customary international law is an independent source of law for U.S. courts." *Id.* Among his criticisms of this view, Bradley points out that evidence of willingness on the part of the political branches to violate international law "also undermines the internationalist conception of the canon." *Id.* at 523. He argues that

> a means of both respecting the formal constitutional roles of Congress and the President and preserving a proper balance and harmonious working relationship among the three branches of the federal government.[120]

While this comment neither accepts nor rejects Bradley's conclusions, his explanation of the evolution of the *Charming Betsy* doctrine is important to its application to WTO decisions. Specifically, such considerations regarding the *Charming Betsy* canon play an important role in rejecting the two extremist approaches (the "rule of law" or the "judicial hands-off" approaches) and accepting a moderate third approach to the current tension between the *Charming Betsy* and the *Chevron* doctrines when opinions by the domestic administrative agencies conflict with the decisions of a foreign WTO panel.

More generally, Bradley's observations underscore the modern relevance of the doctrine as a judicial tool of non-involvement. In other words, courts may justifiably use the canon in order to keep out of fights between the executive and the legislative branches of government. By assuming that an ambiguous statute does not violate international law, courts can "reduce[] the number of occasions in which Congress unintentionally interferes with the diplomatic prerogatives of the President."[121] The canon is based on the more fundamental premise that an

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> [t]he approach of the political branches to the human rights treaties is, for better or worse, a rejection of internationalism. Far from approving the judicial enhancement of domestic law with international norms, the political branches have insisted -- at least in the context of international human rights law, which is the principal focus of the internationalist conception -- that domestic law be preserved unless and until the political branches incorporate the international norms.

Id.

120 *Id.* at 525.

121 *Id.* at 526.

"[a]ct of Congress ought not be construed to violate the Constitution if any other possible construction remains available."[122] The rationale is that the

> Court [should avoid an interpretation of a statute] so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations.[123]

The international implications of a case would lead the Court to describe it as involving "public questions particularly high in the scale of our national interest," and thereby subject to an interpretive canon disfavoring violation of international law.[124]

Of course, the separation of powers rationale for the *Charming Betsy* canon is suspect when the second prong of the *Chevron* doctrine (allowing an agency any permissible interpretation of legislation) and the *Charming Betsy* canon come into conflict.

When the presumption against statutory violation of international law and executive agency interpretation come in direct conflict, the unambiguous congressional intent will override any contrary international obligation. In the specific case of U.S. obligations under GATT, both Congress and federal courts have clearly placed congressional legislation above contrary GATT language.[125] However, where the implementing legislation of GATT agreements, including

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[122] N.L.R.B. v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) (noting that it has "in a number of cases . . . heeded the essence of . . . Marshall's admonition in *Murray*" by declining to interpret an Act of Congress so as "to violate the Constitution if any other possible construction remains available").

[123] *Id.* (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 83 (1963)).

[124] *Id.*

[125] Fed. Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) ("[I]n the event of a conflict between a GATT obligation and a statute, the statute must prevail."); 19 U.S.C. § 3512(a)(1) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.").

the Anti-Dumping Agreement, is ambiguous, the *Charming Betsy* doctrine may apply. GATT and the forming treaty of the WTO are "international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations."[126] In this respect, the *Charming Betsy* canon is in harmony with the first prong of the *Chevron* test (inquiring as to whether a congressional act is ambiguous).[127]

The rules may come in conflict during application of the second prong of the *Chevron* test (determining whether an agency interpretation is permissible). Assuming that Congress has not explicitly spoken to the issue, an administrative agency normally has discretion to implement the legislation in any reasonable way.[128] However, if the agency acts contrary to international law, a court may feel inclined to interpret Congress's implied intent to invalidate the agency's action.[129]

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[126] *Fed. Mogul*, 63 F.3d at 1581 (citing the *Charming Betsy* doctrine in support of its determination that the Anti-Dumping Agreement should be interpreted in accordance with "international economic understanding"). However, the *Federal Mogul* court still upheld Commerce's application of GATT contrary to such international understanding because "Commerce is due judicial deference in part because of its established expertise in administration of the Act, and in part because of 'the foreign policy repercussions of a dumping determination.'" *Id.* quoting Smith-Corona Group v. United States 713 F.2d 1568, 1571 (1984). *See also* Footwear Distrib. & Retailers of Am. v. United States, 852 F. Supp. 1078, 1092 (Ct. Int'l Trade 1994); Fundicao Tupy S.A. v. United States, 652 F. Supp. 1538, 1543 (Ct. Int'l Trade 1987) ("An interpretation and application of the statute which would conflict with the GATT Codes would clearly violate the intent of Congress.").

[127] *See* discussion *supra* Part III.B.1.

[128] The Federal Circuit Court of Appeals quipped that "there may be some question whether Commerce's new methodology is entitled to *Chevron* deference." *Fed Mogul*, 63 F.3d at 1580. The court noted "the uneven history of Commerce's approach to this problem," and "that Commerce's approaches have been found unlawful in prior decisions." *Id.* at 1579. Nevertheless, the court applied a *Chevron* standard of deference to the agency's interpretation of antidumping law because Commerce had a long-standing policy that was not unreasonably interpreted from the statute. *Id.* at 1580. As noted above, this comment assumes that a court would utilize a *Chevron*-like deference to the interpretation of antidumping law by Commerce and the Trade Administration. One reason for this assumption of deference is that a court will grant deference simply because the agencies are acting within foreign affairs. United States v. Mead Corp., 533 U.S. 218, 229 (2001).

[129] However, in at least one case, the Supreme Court ignored the *Charming Betsy* doctrine altogether and summarily refused to imply a prohibition on international abductions in the United States-Mexico Extradition Treaty based on overwhelming international law. U.S. v. Alvarez-Machain, 504 U.S. 655, 669–670 (1992). The Court acknowledged that the action of U.S. DEA agents was "shocking," and that "it may

Courts are reluctant to invalidate executive action in foreign affairs based on the *Charming Betsy* doctrine without a clear international norm.[130] Courts express this reluctance "because of practical necessity and executive branch expertise, Congress may need to delegate especially broad foreign affairs powers to the Executive."[131] This need to delegate is required because

> congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[132]

Recognizing this judicial reluctance to apply international law to invalidate executive action, what are the sources of international law that might invoke the *Charming Betsy* doctrine? The International Court of Justice ("ICJ"), possibly the most well-recognized international tribunal, recognizes four particular sources of international law: (1) "international conventions"; (2) "international custom, as evidence of a general practice accepted as law"; (3) "general principles of law recognized by civilized nations"; (4) certain "judicial decisions and the teachings of the most highly qualified publicists of the various

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[have] be[en] in violation of general international law principles." *Id.* at 669. However, the Court concluded that the prohibition was not expressly written into the treaty and that therefore "the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch." *Id.* In any case, *Alvarez-Machain* breaks with the traditional canon and has not been widely accepted in the U.S. or in the international community. *See* INTERNATIONAL LAW 221-225 (Carter et al. eds., 4th ed. 2003).

[130] Hyundai Elec. Co. v. United States, 53 F. Supp. 2d 1334, 1345 (Ct. Int'l Trade 1999) ("So viewed, unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine.").

[131] Bradley, *Chevron Deference*, *supra* note 55, at 688 (citing the *Curtiss-Wright* decision and its progeny in support of this judicial presumption).

[132] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

nations, as subsidiary means for the determination of rules of law."[133] The ICJ statement of international law appears to confute any *res judicata* effect of the decisions of international tribunals. First, "judicial decisions" are only cited as "subsidiary means for the determination of rules of law."[134] Second, the forming treaty of the ICJ specifically prohibits a *res judicata* effect of the ICJ's decisions.[135] There is no establishment of precedent by the decision of an international court.

Similarly, the Restatement identifies three principal sources of international law:

> (1) [c]ustomary international law result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation; (2) [international agreements that either] create law for the states parties thereto [or] lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted; and (3) [g]eneral principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement . . . as supplementary rules of international law where appropriate.[136]

The decisions of international tribunals are noticeably absent from this list of sources of international law. While such tribunals may be evidence of an international norm or interpretation, they are not widely recognized by U.S. courts as a general source of law.

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[133] Statute of the International Court of Justice, October 24, 1945, art. 38, 59 Stat. 1031, T.S. No. 993.

[134] *Id.*

[135] *Id.* ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

[136] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

There is an important distinction between customary international law and positive treaty law: a federal court would likely require clear positive declaration of the norm by an authoritative U.S. domestic source to invalidate an executive foreign affairs action.[137] In *Garcia-Mir*, the Eleventh Circuit declared that public international law is controlling only "where there is no treaty and no controlling executive or legislative act or judicial decision."[138] The court went on to hold that, though "courts must construe American Law so as to avoid violating principles of public international law," the executive branch may legally violate customary international law by affirmative declaration or conduct.[139] However, this distinction does not apply directly to this comment because WTO panel decisions are not reflections of customary international law.[140] Rather, panel decisions are evidence of international understanding of the Commerce Department's obligations under treaty.[141]

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[137] Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir.), *cert. denied*, 575 U.S. 1022 (1986). In *Garcia-Mir*, the court upheld the indefinite and arbitrary detention of immigrants in the U.S. by the Attorney General, even though such detention was contrary to international law. *Id.* The court held that a public international norm could be rendered ineffective within the U.S. if contradicted either by a legislative act, executive act, or a judicial decision. *Id.* at 1453- 1455.

[138] *Id.* quoting The Paquete Habana, 175 U.S. 677, 700 (1900); *see* Lauritzen v. Larsen, 345 U.S. 571, 578 (1958).

[139] *Garcia-Mir*, 788 F.2d at 1453.

[140] A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1528 (2003) ("U.S. courts should react cautiously to suggestions that they rely on the opinions of international tribunals as sources of rules of [customary international law]."). In particular, Weisburd was concerned that International Tribunals do not usually reflect the current state of customary international law ("CIL") because while CIL is built as a quasi-common law body of jurisprudence (developed over time by jurists), international tribunals generally carry no precedent-creating powers and are difficult to correct. *Id.*

[141] Though this author asserts that Panel decisions may be "evidence of" international understandings, this does not imply that they are necessarily reliable evidence of international understanding. There are many problems with the decision-making processes of international tribunals that may render their judgments suspect. *See e.g.* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 461 (2003) (noting the difficulties of having counter-majoritarian international tribunals with no international "supreme court" to provide continuity); John M. Czarnetzky & Ronald J. Rychlak, *An Empire Of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 59 (2003) (arguing that the International Criminal Court contains a "fundamental flaw" because it lacks "any moral and political check as part of [its] structure").

The interpretation of international obligations by an international tribunal does not have mandatory binding effects within the United States. As the Supreme Court noted,

> while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.[142]

Courts nonetheless grant some weight to WTO panel decisions as evidence of international understandings of treaty obligations.

Roger Alford identified a spectrum of deference granted to the application of international tribunal decisions.[143] Alford analyzed, among other issues, the judiciary's treatment of WTO panel decisions. He placed the deference granted to WTO decisions in the middle of his continuum, where federal courts consider the panel decision "as part of the process of interpreting and construing a domestic statute, without considering the possibility of directly recogniz[ing] and enforc[ing] the [panel] decision."[144]

Despite the lip service paid to panel decisions as evidence of international agreement, such decisions are apparently given little weight in practice. In *Timken*, the court summarily discussed and then dismissed the WTO panel decision at issue in the *Corus* case.[145] The court first noted that because the

[142] Breard v. Greene, 523 U.S. 371, 375 (1998).

[143] Alford, *supra* note 53, at 731.

[144] *Id.*

[145] Timken Co. v. United States, 240 F. Supp. 2d 1228, 1243 (Ct. Int'l Trade 2002) (discussing the *EC Bed Linen* decision by the WTO Appellate Body).

United States was not party to the *EC Bed Linen* case, there was no direct effect of the decision on the legality of U.S. zeroing practices.[146] Secondly, the court declined to compare European and U.S. zeroing practices and found it dispositive that the WTO decision only addressed the former. The court distinguished the WTO decision from the issue before it because

> the *EC-Bed Linen* decision involved a comparison, made during an antidumping investigation, of weighted averages for export prices and normal value, while the instant case involves a comparison, made during an administrative review, of weighted-average normal values to transaction- specific export prices.[147]

However, this distinction may be criticized because both decisions, that of the WTO panel and the *Timken* Court, were premised on review of essentially the same methodology: zeroing. The WTO in *EC Bed Linen* decided generally that zeroing was illegal and contrary to obligations under the Anti-Dumping Agreement.[148] *Timken* is an example of a U.S. domestic court straining interpretation of a panel report in order to avoid direct conflict between the WTO and an administrative agency.

IV. What U.S. Courts Should Do In The Future

Now that the conflict between WTO panel decisions and U.S. executive action in antidumping cases has been explored, we can look at the possible solutions to this conflict. There are three general approaches to the problem. The

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146 *Id.*

147 *Id.*

148 *EC Bed Linen*, WT/DS141/AB.R (Mar. 1, 2001), *available at* 2001 WTO LEXIS 13.

first has been termed the "Marbury" approach, where courts take significant steps into the arena of international law and apply international jurisprudence directly in U.S. courts. On the opposite end of the spectrum, courts may take a hands-off approach; deferring to the executive on all matters of interpretation of international agreements and obligations under international law.

Between the two extremes, this author proposes a third approach that would require the Commerce Department to defend any practices in enforcing antidumping duties that run afoul of WTO panel decisions. In other words, WTO panel decisions would create a presumption as to the U.S.'s obligations under GATT. Commerce could rebut the presumption by showing a pressing need for judicial deference to Commerce's determination. This third approach blends the presumptions of the *Chevron* doctrine, the traditional deference to the executive's role in international affairs, the *Charming Betsy* canon, congressional intent that the U.S. trade on equal and fair terms with the rest of the world, and respect for international organizations, like the WTO, that promote trade among nations.

A. Why a "Marbury" Approach Would Not Work

There is an approach, sometimes referred to as the "Marbury approach," that seems inadequate for this question. As Marshall so famously wrote, it is "the province and duty of the judicial department to say what the law is."[149] Some authors have advocated a strict "rule of law" approach to foreign affairs jurispru-

[149] Marbury v. Madison, 5 U.S. 137, 177 (1803).

dence and an abandonment of the traditional deference given to the executive in foreign affairs.[150]

While this view certainly appears attractive for its simplicity and apparent championing of neutral legal structures, it fails to take account of the realities of international relations, and in particular, international antidumping law. The most obvious objection to direct judicial application of WTO panel decisions on domestic actions of a political branch of government is the lack of statutory or constitutional authority to do so. The federal judiciary only has power to decide cases or controversies granted it by Congress or the Constitution.[151] As noted previously, Congress has explicitly forbidden direct application of WTO appellate decisions on domestic law.[152] Additionally, the *Charming Betsy* canon would not justify such a direct implementation of international law. The canon has never been a substantive source of law, but rather at most a tool of construction.

B. Why a Judicial "Hands-off Approach" Would Not Be Advisable

As pointed out above, there are many reasons why interpretation of trade law should not be in the exclusive domain of the executive.[153] However, that only answers half of the question, i.e., whether the Judiciary should stay out of an

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[150] *See, e.g.*, Charney, *supra* note 55, at 813. *See also* Bradley, *Chevron Deference*, *supra* note 55, at 650 n.2 (referencing those who support the "Marbury approach").

[151] U.S. CONST. art. III, § 2, cl. 1.

[152] *See* Alford, *supra* note 53.

[153] *See* discussion *supra* Part III.B.2.

international trade law dispute between the executive branch and an international tribunal. One must further inquire, "Why should the judiciary step in?"

As noted previously, the *Charming Betsy* canon has come under criticism and its continuing relevance questioned. During the height of the realist era, interpretative canons in general were heavily criticized as contradictory, inaccurate fictions of congressional intent, and tools of judicial activism.[154] Despite these criticisms, the *Charming Betsy* canon has continuing significance if it either truly reflects a discernable legislative intent or a legitimate judicial policy decision. Congress, by implementing the Anti-Dumping Agreement directly in U.S. law with little modification, expressed its intent to harmonize U.S. law with international standards.[155] Further, judges may permissibly adopt a policy of international cooperation rather than unilateral antagonism, even if the U.S. is no longer the quaking youngster of a nation it once was. Such a policy judgment fits well within the traditional role of a judge to "bring discretion and judgment to statutory interpretation."[156]

C. Recommended Approach: Use WTO Panel Decisions As Evidence In Determining the Reasonableness of an Agency's Interpretation of U.S. Obligations Under International Law

This author advocates that courts grant some weight to relevant panel "precedent"[157] when reviewing the appropriateness of Commerce's interpretation

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[154] Bradley, *Charming Betsy*, *supra* note 103, at 505–506.

[155] *See generally*, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade, April 15, 1994, Annex 1A, 1994 WL 761483.

[156] Bradley, *Charming Betsy*, *supra* note 103, at 509. *See also* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992) (defending the use of canons of statutory construction generally).

[157] WTO PANEL decisions are not "precedent" in that the decision of the Body in one case has no binding authority to (a) other parties or (b) the same parties in a different dispute. However, such decisions are illustrative of what the Body would do in a similar situation.

of the Anti-Dumping Agreement. When an executive policy regarding antidumping clearly conflicts with a competent international tribunal's decision, the administrative policy should be presumed unreasonable in the absence of explicit congressional approval. Such a presumption would in effect give WTO panel decisions a meaningful place in a traditional *Chevron* analysis of the executive's action.

This presumption of unreasonableness would be overcome by one of the rationales for judicial deference to the executive. Specifically, the executive can attempt to show that use of the WTO panel decision would violate an applicable policy underpinning traditional foreign affairs deference. For example, an agency could defeat the presumption by showing that such application of WTO panel decisions would either (1) impermissibly interfere with U.S. ability to present a united front, or a "sole voice," to the world community; (2) require a court to make a substantive foreign policy decision unsupported by either implied congressional intent or sound judicial policy; or (3) require a federal judge to make a judgment regarding a matter that is within the specialized or privileged knowledge of the agency.[158]

WTO panel decisions are, at the very least, evidence of international understanding of U.S. obligations under international law.[159] As such, they

[158] Of course, the Executive's range of explanations would not be limited to these three possibilities. These explanations are presented because they are explained in this comment. *See* discussion *supra* Part III.A.

[159] *See supra* note 140. WTO panel decisions are certainly not free of questionable influences or outcomes. Nonetheless, federal court rhetoric, if not decisions, typically respects the opinions of international tribunals. Breard v. Greene, 523 U.S. 371, 375 (1998).

invoke a weakened version of the *Charming Betsy* doctrine by indicating to a U.S. domestic court that a competent international tribunal has spoken on the particular issue of U.S. obligations under an international Anti-Dumping Agreement. Given the context of the GATT talks and the purpose of the WTO, it seems reasonable to assume that Congress intended the U.S. to participate in good faith in a harmonized international trade regime, and due attention to the decisions of WTO Panels aids that harmonization.

Applying this approach to *Corus*, the court would have recognized that Commerce may have a legitimate reason to use a zeroing methodology while calculating antidumping duties. Namely, such calculus may be necessary to combat "masked dumping," a purpose that the Court of International Trade has recognized as legitimate.[160] Such a purpose may demonstrate a need for the Trade Administration to exercise its unique institutional competence and specialized knowledge to address the problem. The court, however, would not have ended the inquiry there.

The court would have then addressed the contrary WTO panel decision and required the Trade Administration to demonstrate a pressing need (i.e. one of the three political deference doctrines mentioned above) for judicial deference of the administrative agency's action in this case. Mere assertion of potential

[160] Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. United States, 926 F.Supp. 1138, 1150 (Ct. Int'l Trade 1996) ("Commerce justifies use of this methodology on the ground that it is necessary to combat masked dumping."); Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce, 675 F.Supp. 1354, 1361 (Ct. Int'l Trade 1987) ("Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law.").

masked dumping would not be enough. Rather, the Administration would have to overcome the presumption against application of antidumping law contrary to WTO panel decisions by showing one of the "political questions" mentioned above.[161]

Such an approach would recognize that the ultimate authority on U.S. obligations under international law rests with the domestic political branches; Commerce could still act contrary to international opinion if it could show a pressing need. Nevertheless, requiring an administrative agency to demonstrate why its interpretation of antidumping law is proper, despite being contrary to international opinion, would encourage implementation of a transparent and fair international antidumping regime. Such a fair and transparent playing field clearly represents the policy of the Anti-Dumping Agreement.

In addition, requiring explicit reasoning by Commerce would tend to preserve the separation of powers between the political branches and the judiciary. A rebuttal by Commerce would grant private parties more notice as to when and why the U.S. is going to ignore the rules by which the rest of the world works. Such an explicit explanation may have saved parties like those in *Corus* from resorting to litigation.[162] Rather, with Commerce's intent clear and

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[161] *See supra* note 158.

[162] It is unlikely that Corus itself would have been dissuaded from filing suit by the approach recommended here. As noted already, *Corus* appears to be a test case in order for the European Community to request a WTO Panel on the subject of zeroing. *See supra* note 49. However, parties that are not part of such a setup would likely benefit from the additional clarity required of the Commerce Department if WTO decisions were given greater weight by courts.

unassailable in court, Corus would have been more likely to petition the political branches directly. In the end, courts could avoid deciding sensitive trade issues by requiring Commerce to more explicitly explain the need for foreign affairs deference in the face of contrary WTO panel decisions.

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